

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON E. WALKER,	§
	§
Defendant Below-	§ No. 517, 2005
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0405000068
Plaintiff Below-	§
Appellee.	§

Submitted: November 22, 2006

Decided: February 15, 2007

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

ORDER

This 15th day of February 2007, upon consideration of the parties' briefs and supplemental briefs, as well as the record on appeal, it appears to the Court that:

(1) The appellant Jason Walker was tried in July 2005 on charges that included capital murder, attempted robbery, and weapon offenses. A Superior Court jury convicted Walker of two counts of first degree murder, five counts of possession of a firearm during the commission of a felony, two counts of attempted first degree robbery, one count of unlawful imprisonment, and one count of conspiracy. After holding a penalty hearing

and receiving the jury's recommendation, the Superior Court sentenced Walker, among other things, to two terms of life imprisonment.

(2) Walker was represented at trial by court-appointed counsel. After the notice of appeal was filed, Walker filed an affidavit requesting leave to dismiss his counsel and to represent himself on appeal. We remanded the matter to the Superior Court for a hearing on Walker's request. The Superior Court determined that Walker's request to waive his right to counsel on appeal was made intelligently and voluntarily with full knowledge of the hazards of self-representation. After the matter was returned to us from remand, this Court granted Walker's request to exercise his right to self-representation and granted his counsel leave to withdraw.

(3) Walker filed his pro se opening brief on appeal, which raised three issues for the Court's consideration. First, Walker contended that the Superior Court violated his constitutional right to represent himself at trial. Second, Walker asserted that he was deprived of his right to a fair trial when the Superior Court admitted testimony regarding a gun over defense counsel's objection. Finally, Walker argued that the Superior Court deprived him of his right to a fair trial by excluding evidence of statements made by the deceased victim. After considering the State's answering brief and Walker's reply, the Court directed the parties to file supplemental

memoranda addressing the applicability of the Court's recent decision in *Brathwaite v. State*¹ to Walker's claimed denial of his right to self-representation. The Court has received the supplemental memoranda and addresses here all of the issues raised on appeal.

(4) The trial record fairly supports the following version of events leading to Walker's arrest: On April 19, 2004, about ten minutes before closing at 8:00 p.m., two men walked into Tull's Aquarium and Pet Shop and walked directly to the fish room at the rear of the store. Joseph Alexander was working at the store with his uncle, Kenneth Tull. Alexander followed the two men to the fish room and asked if they needed help. One of the men inquired about aggressive fish. After an exchange of information, the man asked to purchase a red devil fish. After Alexander climbed a ladder to retrieve and bag the fish, he turned around and one of the men had a black, semiautomatic gun pointed in his face. The man told Alexander to get down and the other started duct taping Alexander's hands and feet together. While this was being done, Alexander saw his uncle walking toward the fish room. He heard the gunman yell, "Get down," and then Alexander heard two shots fired and the sound of breaking glass. After the men ran out of the store, Alexander was able to free himself. He found

¹ *Brathwaite v. State*, 2006 WL 1911132 (Del. July 10, 2006).

his uncle in the front of the store, bleeding, with a phone in his hand. Kenneth Tull's 911 call was received at 7:58 in the evening. Tull died from his injuries on April 30, 2004.

(5) Several witnesses who lived or worked near Tull's Aquarium and Pet Store were able to give information to the police regarding two black men in an older model, black Cadillac, which was seen speeding away from Tull's around 8 p.m. on April 19, 2004. One witness was able to give police a partial Delaware license tag number of the Cadillac. Police arrested Walker on April 30, 2004. That same evening, police officers conducted a photographic line-up for eyewitness Joseph Alexander. Without hesitation, Alexander identified Walker as the perpetrator of his uncle's murder.

(6) The Superior Court docket reflects that defense counsel filed numerous pretrial motions on Walker's behalf seeking to suppress the admission of various items of evidence. The docket also reflects that, on April 25, 2005, Walker, on his own behalf, filed a document entitled, "Motion to Request to Proceed Pro Se Pursuant to Rule 26(d)(iii)."² There is no indication that Walker served either his own counsel or counsel for the State with a copy of his motion. Moreover, although the Superior Court

² There is no Rule 26(d)(iii) in the Superior Court Criminal Rules. Presumably, Walker was referencing the procedure for waiving counsel on appeal, which is set forth in Supreme Court Rule 26(d)(iii).

docket entry includes a notation that the motion was referred to the assigned trial judge, there is no other indication in the record that the motion was ever seen by the trial judge prior to trial.³ After the filing of his pro se motion, the Superior Court docket reflects that Walker's defense counsel continued to file motions on his behalf and continued to actively represent Walker at all of the pretrial proceedings leading up to his eventual first day of trial on July 19, 2005. There is no indication that Walker pursued his request to proceed pro se until, after four days of jury selection and three days of trial testimony, Walker's defense counsel notified the Superior Court on July 22, 2005, the eighth day of trial, that Walker wanted to proceed pro se for the remainder of his trial. The trial judge addressed Walker's request at a sidebar conference and denied it as untimely.

(7) On appeal, Walker first contends that he was denied his constitutional right to represent himself at trial.⁴ The right to self-representation is a corollary of the right to counsel and is specifically guaranteed by the Delaware Constitution.⁵ The right to self-representation is

³ In ruling on Walker's mid-trial request to proceed pro se, the trial judge noted that any previous written request by Walker to proceed pro se had "never been brought to [the judge's] attention."

⁴ See *Faretta v. California*, 422 U.S. 806 (1975).

⁵ Del. Const. art. I, § 7.

not unqualified,⁶ however, and may be waived more easily than the right to counsel.⁷ Moreover a defendant may waive the right to self-representation after asserting it.⁸ Waiver may be established by a defendant's failure to reassert the request, if it would not be futile to do so.⁹

(8) The record in Walker's case reflects that, several months prior to trial, Walker filed a single-page, pro se application requesting to discharge his attorneys and represent himself. Walker did not serve his motion on defense counsel or on counsel for the State. Walker never raised the issue at critical junctures before trial and continued to allow his attorneys to represent him until the eighth day of trial.¹⁰ Under these circumstances, Walker's inaction can only be interpreted as an abandonment of his initial April 25, 2005 request to represent himself. We also find no abuse of the Superior Court's discretion in denying Walker's renewed request to represent himself on the eighth day of trial. The potential disruption to the

⁶ Before granting a defendant's request to proceed pro se, the trial court must determine, in its discretion, that the request is made knowingly, intelligently, voluntarily. *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996). Moreover, a defendant's right to represent himself is "sharply curtailed" once the trial has begun. *United States v. Stevens*, 83 F.3d 60, 67 (2d Cir. 1996).

⁷ *Buhl v. Cooksey*, 233 F.3d 783, 802 n.20 (3d Cir. 2000).

⁸ *Id.* at 800.

⁹ *Brathwaite v. State*, 2006 WL 1911132, *2 (Del. July 10, 2006) (citing *Wilson v. State*, 204 F.3d 33, 37 (2d Cir.), *cert. denied*, 531 U.S. 892 (2000)).

¹⁰ *See Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1992) (holding that "defendants forfeit self-representation by remaining silent at critical junctures before or during trial"), *cert. denied*, 507 U.S. 930 (1993).

proceedings in progress clearly outweighed any possible prejudice to Walker's legitimate interests.¹¹ Accordingly, we reject Walker's first claim on appeal for lack of merit.

(9) Walker next asserts that the Superior Court erred in allowing the State to present the testimony of a witness who was an acquaintance of Walker, and who testified to hearing Walker state, on at least one prior occasion, that he liked semiautomatic handguns, had one at home, and knew where he could get such weapons in Dunleith and Wilmington. Defense counsel objected to the anticipated testimony, arguing that it was not relevant or, alternatively, that its probative value was outweighed by its prejudicial impact.¹² The State argued that the testimony was relevant to establish a link between Walker's possession of or access to a semiautomatic handgun and the semiautomatic handgun that Alexander testified Walker pointed at him during the robbery.¹³ The Superior Court overruled defense counsel's objection.

(10) Relevant evidence is defined as "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination

¹¹ *United States v. Stevens*, 83 F.3d 60, 66-67 (2d Cir. 1996) (quoting *Maldonado v. Denno*, 348 F.2d 12, 15 (2d. 1965)).

¹² See Del. Unif. R. Evid. 401, 403 (2007).

¹³ No weapon was ever recovered by the police.

of the action more probable or less probable than it would have been without the evidence.”¹⁴ The determination of relevancy is a matter within the sound discretion of the trial court.¹⁵ Under the circumstances of this case, Walker’s admission to possessing a semiautomatic handgun prior to the April 19, 2004 robbery and shooting makes more probable the State’s assertion that Walker threatened Alexander with a semiautomatic handgun. Accordingly, we find no abuse of the Superior Court’s discretion in determining that the witness’s testimony was relevant.

(11) Even if relevant, however, the trial court still may exclude evidence if, in its discretion, it determines that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.¹⁶ Despite Walker’s contentions to the contrary, we find nothing unfairly prejudicial about the very brief testimony offered by the State’s witness regarding Walker’s prior admission to having a semiautomatic handgun at time. The testimony was not, as Walker argues, akin to inadmissible “prior bad act” evidence because the testimony in this case was relevant to establishing a nexus between Walker’s prior admission regarding a semiautomatic handgun and the semiautomatic handgun used in the robbery

¹⁴ Del. Unif. R. Evid. 401 (2007) (emphasis added).

¹⁵ *Lilly v. State*, 649 A.2d 1055, 1060 (Del. 1994).

¹⁶ Del. Unif. R. Evid. Rule 403.

of Alexander and the murder of Tull.¹⁷ Consequently, we find no abuse of the Superior Court's discretion in allowing the testimony into evidence.¹⁸

(12) Walker's final issue on appeal challenges the Superior Court's decision to exclude a statement that Kenneth Tull made to police on April 26, 2006, one week after the shooting and four days prior to his death.¹⁹ In this statement, Tull gave another account of what occurred but he was heavily sedated. The Superior Court granted the State's motion to exclude Tull's statement because the statement was hearsay and did not fall into an exception as either a present sense impression under D.R.E. 803(1), or an excited utterance under D.R.E. 803(2), and did not fall under the residual hearsay exception of D.R.E. 807. The Superior Court noted that Tull was recovering from surgery, was heavily sedated, and had difficulty understanding the questions put to him at the time of his statement. The court, therefore, concluded that the statement lacked sufficient indicia of

¹⁷ Compare *Farmer v. State*, 698 A.2d 946, 948-49 (Del. 1997) (holding that evidence of a gun in defendant's possession was inadmissible because gun could not be linked to the charged crime and indeed varied in appearance from gun described by State's own witnesses).

¹⁸ *Lilly v. State*, 649 A.2d at 1060.

¹⁹ Tull had made an earlier statement to police on April 19, 2004, shortly after he was shot. Although the State moved to suppress both of Tull's statements, the Superior Court held that Tull's statement on April 19 was admissible under the dying declaration exception to hearsay evidence. See Del. Unif. R. Evid. Rule 804(b)(2).

trustworthiness to fall within the residual hearsay exception of D.R.E. 807.

Walker argues on appeal that this ruling was erroneous.

(13) While we review evidentiary rulings on appeal for an abuse of discretion, to the extent the trial court's ruling is based on its factual findings, we must determine whether there is sufficient evidence in the record to support those and determine whether those findings are the result of a logical and orderly deductive process.²⁰

(14) The record of an evidentiary hearing reflects the testimony of the detective who visited Tull on the morning of April 26, 2004 while Tull was in the intensive care unit of the hospital. The detective met with Tull for about thirty minutes that morning. Tull spoke in a low voice, sometimes asked the detective to repeat questions, and seemed many times not to understand the questions at all. Tull did not respond to all of the detective's questions and appeared to be in a great deal of pain. The detective testified that he tried interviewing Tull later again that same afternoon. The detective testified that this interview with Tull was less productive than the morning interview. Tull seemed extremely confused and would take several minutes before attempting to respond to questions. Four days later, Tull died from his injuries.

²⁰ *Viridin v. State*, 780 A.2d 1024, 1030 (Del. 2001).

(15) Based upon the record before us, we conclude that there was sufficient evidence to support the Superior Court's factual findings concerning the lack of trustworthiness of Tull's statements on April 26, 2004 and that those findings were the result of a logical and orderly deductive process.²¹ Accordingly, we find no abuse of the Superior Court's discretion in holding that Tull's statements were inadmissible hearsay that did not fall within the residual exception of D.R.E. 807.²²

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely
Justice

²¹ *Id.*

²² *See Cabrera v. State*, 840 A.2d 1256, 1268 (Del. 2004) (holding that the requirements of D.R.E. 807 are to be construed narrowly "so that the exception does not swallow the hearsay rule").